

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF BAY STATE GAS COMPANY
TO INCUR LONG-TERM DEBT OF UP TO \$50,000,000**

DTE 02-73

**REPLY OF LOCAL 273 TO BAY STATE OPPOSITION TO PETITION TO INTERVENE
OF LOCAL 273**

Local 273, Utility Workers Union of America, AFL-CIO (“Local 273”) hereby replies to the Opposition filed by Bay State Gas Company (“Bay State” or “Company”) on December 9, 2002 to the Petition to Intervene filed by Local 273 on December 5, 2002. Bay State’s Opposition is ill-founded in law and contrary to Department practice. The Department should grant Local 273’s Petition.

1. Bay State properly notes that the Department has broad discretion under G.L. c. 30, §10 and its own regulations, 220 CMR 1.03, to allow interventions by interested parties. It offers no explanation as to why this case so fundamentally differs from the several other Bay State cases in which the Department allowed Local 273 to intervene that intervention should be denied here. In fact, none of the cases cited by Bay State for denying intervention, which turn on unique facts (as discussed below), involves a petition to intervene by a labor organization. Contrary to Bay State’s arguments, this Department has not only allowed Local 273 to intervene in several proceedings, it routinely allows other unions to intervene fully in a broad range of cases. *See, e.g., Massachusetts Electric Company*, DTE 96-25 (Massachusetts

Alliance of Utility Unions allowed to intervene); *Boston Edison Company*, DTE 96-23

(Massachusetts Alliance of Utility Unions; Local 387, Utility Workers Union of America; and Local 369, Utility Workers Union of America allowed to intervene). Local 273 is unaware of any Department decision denying intervention to a labor organization, and Bay State offers nothing to justify reversing the consistent Department practice of granting intervenor status to these organizations.

2. Contrary to Bay State's arguments, Local 273's members will be directly and substantially affected by this proceeding, as much as many intervenors who have been granted intervention status in Department cases. Bay State is proposing to refinance at extraordinarily high interest rates, some 250 basis points above the current rate for treasury notes of comparable maturity, stating that it will pay up to 7.75% interest to Nisource Finance Corp. This latter entity is an affiliate of Bay State's financially troubled parent, Nisource, Inc., raising the question whether the interest rate is designed to unduly enrich the Nisource Finance affiliate and ultimately help the parent company address billions of dollars in staggering debt. The rate Bay State proposes to pay is significantly higher than 75% of the long-term debt Bay State has outstanding. See Bay State Petition, Exh. 3 (showing that 75% of Bay State's outstanding debt bears a cost as low as **6.26%** and no higher than 7.625%). Local 273 intends to explore whether this previously-issued debt was issued at times when prevailing interest rate were **higher** than at present, and whether paying 7.75% at the present time is thus completely unjustified. To the extent that Bay State will pay an unjustified premium to Nisource Finance, this weakens Bay State's financial health, directly affecting day-to-day operations, service quality, staffing levels,

and the environment in which Local 273 members perform their jobs. Thus, the Company could not demonstrate that it has met the “public interest” requirement of G.L. c. 164, § 15 that is necessary to obtain the waiver it seeks. Local 273 has every right to participate in the present proceeding, and the Department has the legal discretion to grant its intervention petition.

3. Bay State’s citation to *New England Telephone and Telegraph Company*, DTE 98-15 (Phase II, III)(1999) and *jus tertii*¹ arguments could not be less apposite. The portion of the cited decision dealing with *jus tertii* has nothing to do with petitions to intervene, but instead rejected arguments raised by AT&T, an intervenor in that case, on behalf of unspecified parties.
4. Bay State’s reliance on *Robinson v. DPU*, 835 F.2d 19 (1st Cir. 1987) is also misplaced. Stanley U. Robinson, III is an individual ratepayer who intervened in an extraordinary number of the Department’s cases, starting in the early 1970’s. *See, e.g., Boston Edison Company v. DPU*, 375 Mass. 1 (1975); *Attorney General v. DPU*, 390 Mass. 208 (1983); *Robinson v. DPU*, 835 F.2d 19 (1st Cir. 1987); *Robinson v. DPU*, 412 Mass. 458 (1992); *Robinson v. DPU*, 416 Mass. 668 (1993). The Department ultimately concluded that Robinson, a *pro se* party, engaged in dilatory tactics that impeded an efficient hearing process. After several interventions by him, the Department limited, but did not preclude, his participation. As the

¹ “Jus tertii” means the “right of a third party” but more generally refers to the doctrine that courts “do not decide what they do need not to decide,” including arguments raised by litigants on behalf of third parties who are not present. *Black’s Law Dictionary* 868(7th ed. 1999).

Supreme Judicial Court noted in one of the earliest cases in which Robinson was allowed to fully intervene:

. . . of 4,700 or so pages of transcripts [in the DPU proceeding]. . . over 900 pages were taken up by Robinson's cross-examination of witnesses.

Boston Edison Company v. DPU, 375 Mass. 1, 45, *cert. denied*, 439 U.S. 921 (1975). In later cases, the Department allowed him only limited participation to ensure that his interventions did not slow down the hearings. In *Robinson v. DPU*, 416 Ma. 668 (1993), a telephone case, the Supreme Judicial Court upheld the Department's right to limit his participation,² in part because he was only one ratepayer representing no one other than himself. The SJC sharply contrasted Robinson's status with labor representatives:

Two union officials representing NET employees were accorded full party status. The DPU justified its decision to allow these two individuals full party status in DPU 89-300 on the basis of their representative capacity.

416 Mass. at 671, n. 4. Thus, not only does Department precedent strongly favor allowing labor organizations to intervene, this state's highest appellate court has favorably noted the Department's practice of preferring parties who are intervening in their "representative capacity" over individual ratepayers.³ The one Robinson case cited by Bay State stands for only the limited proposition that according Robinson "limited participation status" was "fair and reasonable under the circumstances." *Robinson v. DPU*, 835 F.2d 19, 22 (1st Cir. 1987).

² Curiously, Bay State argues that Local 273 should be denied even limited status, despite that the cases it cites involve parties who were granted limited status.

³ Thus, Local 273 will not respond to Bay State's argument "that Local 273 has failed to identify any specific named employees who are asserting a request to intervene."

5. Bay State's citation to *Cablevision Systems Corporation v. Department of Public Utilities*, 428 Mass. 436 (1998) is inapposite as it involved granting limited intervention status to a *competitor* of Boston Edison Company. The Court found that "the public interest did not require it [the Department] to consider the consequences of competition between Cablevision and [an] unregulated affiliate" of Boston Edison Company. *Id.* at 438.
6. Bay State's reference to the fact that the Attorney General is appearing in this case simply argues too much. If the presence of the Attorney General precluded intervention by other parties, then the Department would rarely, if ever, allow interventions because the Attorney General appears in a substantial percentage of adjudicatory proceedings. Further, there would be little reason to advertise the opportunity to intervene, as the Department does in all cases (see, e.g., November 21, 2002 "Notice of Filing and Public Hearing" in this case), as petitioning to intervene would be futile. In the present case, the Attorney General and Local 273 are thus far the only parties to appear. This is not a case that has so many intervenors as to become unwieldy. Local 273 has filed extensive discovery, and the Department would benefit from having that information cogently presented to it. Local 273 believes that it will present information not presently known or available to the Attorney General. Allowing Local 273 to intervene will vindicate one of the essential purposes of the Department's intervention rules: obtaining information that will help inform the ultimate decision in the case.
7. Finally, Bay State takes the extraordinary position, in complete contradiction to fundamental notions of due process, that "Petitioner's claims should be rejected with no opportunity for

further argument.” Bay State Opposition, p. 5. In simple terms, Bay State seeks to pre-empt Local 273’s right to respond. Local 273 is aware of no other instance in which a utility has sought to block an opposing party’s right to make legal argument, and the Department should reject this outrageous claim.

For the reasons presented above, Local 273 asks the Department to grant its petition to intervene.

Respectfully Submitted,

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